IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF CONTRA RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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This brief is filed for the purpose of answering the argument made by respondent on page 11 of his brief that this case should be treated in a different way from ordinary legal actions, because petitioner invoked mandamus in the Court below.

The respondent's argument, in short, is that, even if the decision below were in conflict with the decision in *United States* v. *Irving Trust Co.*, 77 F. (2d) 852 (as petitioner contends, but respondent denies), the conflict would not be sufficient ground for granting the petition herein, because this is a mandamus action wherein the trial court is given wider discretion than in ordinary actions at law; and that this court should not review the novel and important questions involved until there has been a conflict between the *Irving Trust Company* decision and a decision in an "ordinary legal action" involving the identical questions here presented.[1]

It is the petitioner's contention that the Commissioner of Internal Revenue, in refusing to credit or refund the overpayments of taxes found to be due petitioner by the decisions of the Board of Tax Appeals, disregarded clear and precise statutory provisions requiring him to take such action (see appendix to petitioner's brief, p. 23), and petitioner sought mandamus to compel compliance with the statute as the most appropriate remedy. The Court below, while conceding that the Board's finding made mandatory the duty of the Commissioner to make the refund and that mandamus was the proper remedy (R. 36), nevertheless, refused to issue the writ, on the ground that "the remedy by mandamus is controlled by equitable principles" and "to grant it here would not vindicate a right but do a wrong". (R. 40)

The respondent argues (p. 11) that it is the settled policy of this Court "not to disturb a decision (refusing a mandamus) when it represents the exercise of the sound judicial discretion of the Court below." There can be no dis-

[1] Respondent's argument at page 10 of his brief that the *Irving Trust* case is not in conflict because the two courts relied upon different theories in arriving at inconsistent results, is without substance. The conflict of decision is apparent, since the court in the *Irving* case denied the right to apply a barred overpayment against an enforceable deficiency, whereas the court below permits a barred claim for additional taxes to defeat recovery of an overpayment, refund of which is not barred. The views expressed by the respective courts in the opinions cannot obscure the patent conflict of decision.

pute as to this, but it is equally well settled that judicial discretion cannot be used as the basis for the refusal to enforce or observe a valid statute. *Ex Parte United States*, 242 U. S., 27, 42, 44, 61 L. ed. 129, 140, 141; *Ex Parte United States*, 287 U. S. 241, 250, 251, 77 L. ed., 283, 287, 288; *Miguel* v. *McCarl*, 291 U. S. 442, 78 L. ed. 901. In the last mentioned case the court below (by Groner, J., who wrote the opinion in the instant case) refused mandamus because it "should not issue in a case of doubtful inference from statutes of uncertain meaning, for in such circumstances the duty sought to be controlled is regarded as involving the character of judgment or discretion." See 66 F. (2d) at p. 566. This Court said, however, as to these same statutory provisions (291 U. S., p. 453), "Statutory provisions so clear and precise do not require construction. In such case, as this Court has often held, the language is conclusive. 'There can be no construction where there is nothing to construe' ", and reversed the court below.

In the instant case the court below expressly held (R. 36) that the finding of the Board of Tax Appeals made mandatory the duty of the Commissioner to make the refund; that the statute authorizing refunds did not involve the exercise of discretion; and that mandamus is an appropriate remedy, because nothing that the petitioner could obtain from a judgment in the Court of Claims or the District Court would be any more adequate or specific. This being so, it is submitted that the Commissioner's concluding argument on page 11 of his brief, that this case should be treated in a different way "from ordinary legal actions where the discretionary powers of Courts will be less emphasized", is entirely without support in reason or in precedent.

The cases cited by respondent at page 11 in support of his argument that this Court will not disturb the court below in refusing mandamus when such decision represents the exercise of sound judicial discretion are not in point. In *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 62 L. ed. 309, mandamus was sought to compel the Secretary of the

Interior to restore to the rolls a patent for land, the entry of which had been procured by fraud and perjury, and cancelled for that reason. This Court refused mandamus in that case because of the fraud, and it is conceded by respondent (R. 25) that there is no such element in the instant case.

In *Arant* v. *Lane*, 249 U. S. 367, 63 L. ed. 650, mandamus was sought by a government employee to vacate his order of dismissal and restore him to office, which was refused solely on the ground of laches because the petition was not filed until twenty months after relator's removal from office. There is no suggestion of any laches in the instant case.

In *United States* v. *Dern*, 289 U. S. 352, 77 L. ed. 1250, mandamus was invoked to compel the Secretary of War and Chief of Engineers to authorize the construction of a wharf in the Potomac River on land which the National Capital Park and Planning Commission, by proper action as authorized by Acts of Congress, had indicated its intention to appropriate for construction of a parkway. It was refused because it was not shown that petitioner was "clearly entitled" to build the wharf, and also because its construction would only increase the cost of condemning the land to the Government, without any substantial advantage to petitioner (see 289 U. S., p. 360), the circumstances thus being in no way similar to the facts in the instant case.

Respectfully submitted,

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